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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1959

No. 707

MELVIN HARRIS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

Petition for Writ of Certiorari

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INDEX.

	PAGE
OPINION OF THE COURT BELOW	1
STATEMENT OF JURISDICTION	1
QUESTION PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF CASE	3
REASONS FOR GRANTING WRIT	7
CONCLUSION	12
APPENDIX 1 (OPINION OF THE SUPREME COURT OF ILLINOIS)	13

List of Authorities.

Cases.

Atkins v. Texas, 325 U.S. 398	9
Cassell v. Texas, 339 U.S. 282	9, 10
Fay v. People of the State of New York, 322 U.S. 261	8
Glasser v. United States, 315 U.S. 60	7, 8
Hall v. United States, 168 F. 2d 161 (D.C. Cir. 1942)	10, 11
Poret v. Sigler, ... U.S. ..... (October Term, 1959, No. 307, Misc.)	12
Smith v. Texas, 311 U.S. 128	7, 8, 9, 10

Constitutional Provision.

U. S. Const., Amend. XIV	2

Statutory Provision.

United States Code, Title 18, Section 242	2

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Petition for Writ of Certiorari

OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Illinois is reported at 17 Ill. 2d 446, 161 N.E. 2d 809. (Appendix 1, *infra.*)

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Illinois was entered on September 24, 1959; a timely petition for rehearing was denied on November 16, 1959.

The statutory provision believed to confer upon this Court jurisdiction to review the judgment in question by writ of certiorari is Title 28 United States Code, Section 1257(3).

QUESTION PRESENTED

Whether the use by the State's Attorney of his peremptory challenges to systematically exclude Negroes from the petit jury deprived the petitioner, a Negro, of his right to be tried by a fair and impartial jury and further deprived him of his liberty without due process of law and denied to him the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code
Title 18, Section 242:

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any state on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000.

STATEMENT OF THE CASE

The petitioner, Melvin Harris, hereinafter sometimes referred to as the defendant, was indicted by the Grand Jury of Cook County, Illinois for the crime of unlawful possession of a narcotic drug. He was tried by a jury in the Criminal Court of Cook County. The jury returned a verdict of guilty in manner and form as charged in the indictment; and the defendant was sentenced to the Illinois State Penitentiary for a term of not less than two years nor more than ten years.

The facts of the case as to the crime involved are not in question in this proceeding and we respectfully call the Court's attention to the statement of facts contained in the opinion of the Supreme Court of Illinois (Appendix 1, pages 13, 14, *infra*.)

The important facts as to this proceeding concern the selection of the jury and the motions made therein. We therefore set forth here the proceedings thereon as they appear in the abstract of record as prepared for use in the Court below, nine copies of which are filed with this petition. The questions were further preserved by the motion for new trial (Abstract page 6), the assignment of errors (Abstract page 82), and the brief of Plaintiff in Error submitted to the Supreme Court of Illinois.

[Excerpt from the Abstract of Record (Abst. p. 10-12)]:

* * *

83 Thereupon, a jury was impaneled, sworn to answer questions, and the following jurors were called and examined on their voir dires.

84 Bernard R. Brown, who was excused by the defense.
Rose Calabretta, who was accepted by both sides and sworn to try the issues in this cause.
Ralph E. Tanzer, who was accepted by both sides and sworn to try the issues in this cause.
Clara Dorner, who was excused by the defense.
Edward Wisniewski, who was excused by the State.
James L. Sessa, who was excused by the defense.
Valeria Kocen, who was excused by the State.
Lorraine E. Dalzell, who was accepted by both sides and sworn to try the issues in this cause.
Irene Lee, who was excused by the State.
85 Edmund Schwartz, who was excused by the defense.
Paul Rupp, who was excused by the defense.
Louis Romano, who was excused by the defense.
Phillip Lawler, who was excused by the defense.
Kate Nicholson, who was accepted by both sides and sworn to try the issues in this cause.
John Wilk, who was excused by the defense.
Cora Davis, who was excused by the State.
Bernard Irvin, who was excused by the State.
Mr. Pusateri: The State will excuse Mr. Irvin and Mrs. Davis. Thank you.
Mr. Bellows: Your Honor, may I be heard for a moment, if the Court please?
(Thereupon the following proceedings were had out of the hearing of the jury, to wit:)
86 Mr. Bellows: If the Court please, this is the third juror that has been excused pre-emptorily. They are persons of the colored race. In behalf of the defendant I object to the prosecution dismissing colored jurors on the grounds that it deprives the defendant of a fair and impartial cross-section of the population, and I want to register an objection to it, if the Court please.

The Court: Overruled. I can't control it.

Mr. Bellows: I would like to make my record.

The Court: That's all right.

Mr. Bellows: I think personally it's improper.

The Court: Well I will not comment on it; but, of course, I have no authority and I have no control over it, and a pre-emptorily challenge may be exercised by either party with or without reason and from good or bad motives.

Mr. Bellows: Your Honor, this is the point: You might just as well keep colored jurors out of the building, if you are going to excuse them here where there is a colored defendant on trial. That's my point.

88 (Thereupon, the following proceedings were had in the presence and hearing of the jury, and the following jurors were further examined upon their voir dire:)

Helen Olinski, who was accepted by both sides and sworn to try the issues in this cause.

Anna Nawracay, who was accepted by both sides and sworn to try the issues in this cause.

Frederick Fredweicksen, who was excused by the defense.

Bernice Nettleton, who was accepted by both sides and sworn to try the issues in this cause.

Euld Porche, who was excused by the State.

Charles L. Dobbs, who was excused by the State.

Mr. Lund: I think I will excuse you. And, Mrs. Porche, I will excuse you.

Mr. Bellows: Your Honor.

(Thereupon, the following proceedings were had out of the hearing of the jury, to wit:)

Mr. Bellows: Your Honor, again I object to the dismissal of the last two jurors, Mr. Dobbs and Mrs.

90 Porche, on the grounds that it amounts to a violation of the defendant's right to a jury of a fair cross-section of the community. The defendant is a colored man and the two jurors just now excused, Dobbs and Porche, are also colored, and I want to object to the acts of the prosecution in dismissing these two jurors.

The Court: Overruled for reasons heretofore stated.

(Thereupon, the following proceedings were had in the presence and hearing of the jury, and the following jurors were further examined upon their voir dire:)

Queen E. Reason, who was excused by the State.

Mr. Lund: All right, thank you. The State will excuse Mrs. Reason.

Mr. Bellows: Your Honor.

(Thereupon, the following proceedings were had out of the hearing of the jury, to wit:)

91 Mr. Bellows: Your Honor, this last juror, Mrs. Reason, is also a person of the colored race; and for the same reasons heretofore advanced, I object to the dismissal of that juror.

The Court: The objection is overruled for the same reasons heretofore given.

(Thereupon, the following proceedings were had in the presence and hearing of the jury, and the following jurors were further examined upon their voir dire:)

Gertfude Wysocki, who was accepted by both sides and sworn to try the issues in this cause.

Beverly Wallace, who was accepted by both sides and sworn to try the issues in this cause.

Anna Pitcha, who was accepted by both sides and sworn to try the issues in this cause.

Carolyn Ross, who was accepted by both sides and sworn to try the issues in this cause.

92 (Whereupon, the jury having been sworn to try the issues, the following proceedings were had in the presence and hearing of the jury, to wit:)

* * *

REASONS FOR GRANTING WRIT

The record shows that at the trial of the petitioner, who is a Negro, the State's Attorney exercised his peremptory challenges in such a manner as to exclude from the jury all persons of the Negro race. (Abst. 10-13). No Negro was excused peremptorily or for cause on motion of the defendant.

It is true that a defendant is entitled not to a friendly jury, but only one which is impartial. But this Court has construed the term "impartial" as pertains to juries to mean "representative of the community." Mr. Justice Murphy, speaking for a majority of the Supreme Court of the United States, said this in the case of *Glasser* v. *United States*, 315 U.S. 60:

> ". . . Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' *Smith* v. *Texas*, 311 U.S. 128."

The general terms of the Fourteenth Amendment concerning due process of law and equal protection are made specific not only by decision of the Courts, but also by specific Acts of Congress which provide that "no citizen possessing all other qualifications which are or may be

prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude." 18 U.S.C. §242. It is true that in our present case Negroes were not excluded from the panel of jurors from which the jury was selected. However, it is a long standing rule of the law that that which may not be done directly also may not be accomplished through indirection.

The unconstitutional use of the peremptory challenge by the state, in this case, achieved the same result as if the jury commissioners themselves had excluded the Negroes. The provisions of the Constitution of the United States become meaningless if Negroes are called as jurors only to be excluded by the prosecution. The only difference is the stage of the proceedings at which the exclusion occurs.

In theory at least any person is fully capable of holding the office of fair and impartial juror. In practice this is far from the truth; and, when a white person sits in judgment of a Negro the definition of fairness and impartiality is quite apt to be strained. As said by this Court, "The long history of unhappy relations between the two races . . . has put these cases in a class by themselves." *Fay* v. *People of the State of New York*, 322 U.S. 261, 282.

The *Glasser* case, *supra*, states the rule to be that the jury must be a "body truly representative of the community." 315 U. S. at 85. In so doing this Court relied on *Smith* v. *Texas*, 311 U. S. 128, which held that when Negroes are systematically excluded from jury service in cases involving Negro defendants, such exclusion

deprives the defendant of a jury "truly representative of the community" and "not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." *Smith* v. *Texas*, 311 U.S. 128, 130. So far we know of no decision of this Court which has overruled or in any way modified these decisions. Moreover, to cite authority for the proposition that the defendant is entitled to a trial before a fair and impartial jury would be to cite the entire history of the jury system in this country and in England; if the defendant is not entitled to a fair and impartial jury there is no sense in his being entitled to a jury at all.

This Court has rejected the contention that defendants are entitled to proportional representation of their race on the juries which tried them. *Cassell* v. *Texas*, 339 U.S. 282; *Atkins* v. *Texas*, 325 U.S. 398. But the defendant, Harris, does not claim that he has an absolute right to have the jury which tried him include Negroes; nor does he assert any right to select those veniremen who he feels might not have discriminated against him. The contention that the action of the prosecutor in exercising his peremptory challenges to exclude Negroes from the jury was prejudicial and unconstitutional is not a plea for proportional representation on the jury; it is an assertion that a state official, whose sworn duty it is to see that all trials in which he is involved are conducted fairly and impartially, purposefully embarked upon a course of systematically excluding from jury service persons who were entitled by the laws of the State of Illinois and of the United States to sit on juries. Had the same course been followed by the jury commissioners in selecting the panel we do not believe that this Court would have hesitated

in reversing the cause for the prejudicial and unconstitutional result thereby effected. *Cf. Smith* v. *Texas*, 311 U.S. 128; *Cassell* v. *Texas*, 339 U.S. 182.

The argument that the state has an absolute statutory right to challenge peremptorily is unconvincing. Never in our constitutional history has a statutory right been afforded priority over a constitutional right. Yet that is what has been herein claimed by the State and affirmed by the Court below. It is far more consonant with the plain dictates of the Constitution and moral fairness to hold that where a systematic exclusion of Negroes from jury service has taken place, no matter at what level in the selection of the jury and no matter what statutory grant of authority purports to allow this seemingly "harmless" right which so often results in a deprivation of fundamental rights of prisoners before the bar, it is the obligation of the trial court to inquire into the motives and purposes of the official exercising such authority. Where such inquiry discloses motives and purposes which had they been present in the original selection of the panel would have been condemned and circumscribed by all of the courts of this nation, this Court should then declare it the duty of the trial court to sustain the defendant's objection.

We call the Court's attention to the view expressed in the dissenting opinion of Judge Edgerton in *Hall* v. *United States*, 168 F. 2d 161, 165. In that opinion Judge Edgerton wrote:

> "The Congress on March 1, 1875, enacted that 'no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race,

color, or previous condition of servitude;' and made it a crime for any officer to exclude any citizen on those grounds . . . For us the majestic generalities of the Fourteenth Amendment are thus reduced to a concrete statutory command when cases involve race, or color which is wanting in every other case of alleged discrimination. * * * A Negro who confronts a jury on which no Negro is allowed to sit * * * might very well say that a community which discriminates against all Negroes discriminates against him." "For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government."

* * *

The quoted cases involved systematic exclusion of Negroes or other groups from jury lists or panels. But the spirit and purpose as well as the letter of those cases forbid systematic exclusion of Negroes from a jury that tries Negroes . . . Whether this discrimination against Negroes did or did not violate the Act of Congress I think it violated the plainly expressed policy of Congress, the plainly expressed policy of the Supreme Court, the prosecutor's obligation of fairness, and the due process clause of the Fifth Amendment. These principles, which the court overlooks, collide with the principle on which the court relies. The question is whether they limit it or it limits them.

". . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts". I believe the prosecutor's unfortunate error makes a new trial necessary. (*Hall* v. *United States*, 168 F. 2d 161, 165, 166.)

We submit that this is a problem of extreme importance. It is a facet of the general problem of exclusion of Negroes and other members of minority races from juries trying other members of that race. Only recently this Court gave indication of its interest in this question in the case of *Poret* v. *Sigler*, October Term, 1959, No. 307 Misc. There is great need for this question to be decided and thus quiet an unsettled area of the law of due process.

CONCLUSION.

For the above and foregoing reasons, a writ of certiorari should issue from this Court to review the judgment of the Supreme Court of Illinois in this case.

Respectfully submitted,

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OPINION OF THE SUPREME COURT OF ILLINOIS.

Docket No. 35225—Agenda 13—May, 1959.

The People of the State of Illinois, Defendant in Error, *v.* Melvin Harris, Plaintiff in Error.

Mr. Justice Klingbiel delivered the opinion of the court:

Upon trial by jury in the criminal court of Cook County Melvin Harris was convicted of unlawful possession of narcotics. He was sentenced to imprisonment in the penitentiary for not less than two years nor more than ten. He prosecutes this writ of error, contending that the evidence is insufficient; that his right of cross-examination was improperly curtailed; that incompetent testimony was received for the State; and that the prosecutor's use of peremptory challenges resulted in excluding negroes from the jury, thereby depriving defendant, a negro, of constitutional rights.

The record discloses that on the evening of June 26, 1957, in Chicago, one John Norwood was arrested for possessing narcotic drugs. At about 9:30 P.M. he and two police officers, George Sims and Thomas Bingham, went to a "chicken shack" restaurant at 45th Street and South Parkway, where he made a telephone call. Two other officers, James Bryson and John Urso had followed in another car; and Bryson and Sims entered the place with Norwood. When the call was placed Bryson observed the number dialed, and had Norwood tilt the receiver so that he, too, could hear the voice on the other end of the wire. The number was that of the Metropolitan Liquors, located directly across the street from the chicken shack. After the telephone conversation, Norwood, with officers Sims and

Bingham, went to his apartment where he received a telephone call. Bryson, who had remained at the chicken shack, received a call from officer Sims about 10:30 and shortly thereafter observed defendant come out of the liquor store.

Bryson then entered a car with officer Urso and followed defendant, who was driving a 1957 Lincoln automobile, to 1114 East 45th Street. Defendant stopped his car at that address, entered the building, and a few minutes later come out and drove east on 45th Street to Woodlawn Avenue, where he turned south. The officers managed to follow him on Woodlawn as far as 55th Street, but lost him. They drove on to 62nd Street and Stony Island Avenue, where they observed him standing beside his parked car. Urso went up to defendant, placed him under arrest, and searched him. In his shirt pocket Urso found a brown paper bag, which was taken by officer Bryson and later given to officer Sims who, in turn, delivered it to the chemist at the crime laboratory. In addition to the bag defendant had more than $1700 in cash upon his person. The officers took defendant first to his home, where a search was made of the premises, and then to police headquarters. The paper bag turned over to the chemist contained heroin.

To support the contention that the offense was not sufficiently proved defendant argues that the package taken from him was not shown to be the same one as that tested by the police chemist, and that no field test was made of its contents. The contention is without merit. The officers testified that the package was given to Sims, who placed it in a safe, initialed it, and the following afternoon delivered it to the chemist. There is nothing in the evidence to indicate that it was tampered with, or that a different package was substituted. In the absence of evidence to the

contrary, the facts testified to are enough to show that the contents were not disturbed. The fact that ordinary inferences are drawn from proved facts does not mean that guilt has not been proved beyond a reasonable doubt. *People* v. *Glass*, Docket No. 35072.

Apparently for the purpose of showing that the officers' testimony was the result of spite and hence unworthy of belief, defendant relies upon his evidence that after he was arrested they unsuccessfully tried to extort money from him. The State, on the other hand, points to extensive testimony introduced on its behalf to the effect that defendant attempted to bribe the officers and offered them large sums of money to let him go. Insofar as this review is concerned it is unnecessary to consider at length the issues sought to be injected. Whether a bribe was attempted or solicited is a matter to be investigated and determined in proceedings appropriate for the purpose. It has little bearing upon the sufficiency of the evidence to establish the crime charged in this case. The relevant facts to which the officers testified were enough to establish defendant's guilt beyond a reasonable doubt. Credibility and issues relating thereto were matters for determination by the jury.

Defendant next complains that his cross-examination of officer Sims was unduly limited. Sims had testified on direct examination that he entered the chicken shack with officer Bryson and one John Norwood; that he had a conversation with them; and that Norwood thereafter made a telephone call. To show Norwood's motive or inducement for making the telephone call, counsel for defense on cross-examination asked officer Sims questions concerning the content of his conversation with Norwood and the circumstances of Norwood's arrest earlier in the evening. The

court sustained objections to the questioning, on the ground that it bore no relation to any fact in issue and was too far afield from the acts of Norwood referred to on direct examination. We think the rulings were correct. Even if, as defendant's counsel suggested, Norwood was told that he would not be charged with a crime if he divulged the source from which he obtained narcotics, that fact would have no bearing on the issues in this case. Norwood was not on trial, nor was he called as a witness. The indictment against Harris charged him with possession, not with a sale to Norwood. The inquiry in question could result only in introducing issues unrelated to the offense with which defendant was charged.

It is further contended the court erred in admitting officer Bryson's statement that the voice he overheard on the telephone was that of the defendant. The objection is made on the ground that a foundation was not first laid showing a prior acquaintance with defendant's voice, or an ability to identify the voice heard. The witness testified, on cross-examination, that he had talked to defendant on three previous occasions, that he could recognize the voice he heard on the telephone; and that it was the voice of the defendant. Identity of the person whose voice was overheard was sufficiently established (see *People* v. *Nichols*, 378 Ill. 487), and defendant's contention must be rejected.

As a final ground for reversal defendant alleges an unconstitutional use of peremptory challenges by the prosecutor in selecting the jurors. He says he was deprived of due process and equal protection because the State exercised the right so as to "systematically" exclude negroes. Even aside from the absence of any showing that the prospective jurors were excused solely because of race,

there is no merit whatever in the contention. There was no exclusion of negroes *per se* from the panel itself; and, of course, there were in fact several among the number. The fact that the State's exercise of peremptory challenges resulted in excluding them from the petit jury did not deprive defendant of any constitutional right. (*People* v. *Roxborough*, 307 Mich. 575, 12 N.W. 2d 466, cert. den. 323 U.S. 749, 89 L. ed. 600.) The right of peremptory challenge is a substantial one which should not be abridged or denied. It may, by its very nature, be exercised or not exercised, according to the judgment, will or caprice of the party entitled thereto, and he is not required to assign any reason therefor. 50 C.J.S. 1068, Juries, sec. 280.

We have considered all of defendant's contentions and find merit in none of them. The trial was conducted in a fair and capable manner, and the evidence fully supports the verdict. The judgment is affirmed.

Judgment affirmed.